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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHELLE LYN CONCEPCION,

Defendant and Appellant.

B301262

(Los Angeles County
Super. Ct. No. BA161809)

APPEAL from an order of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Reversed and remanded with directions.

Jonathan Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Idan Ivri and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Michelle Concepcion appeals from a post-conviction order denying her petition for resentencing under Penal Code section 1170.95.¹ The trial court summarily denied the petition without appointing counsel on two grounds: first, that Senate Bill No. 1437 (S.B. 1437), which added section 1170.95 to the Penal Code, was unconstitutional, and second, that appellant acted “with the intent to kill [when she] aided and abetted the murder of the underlying victim and/or was a major participant who acted with reckless indifference to human life.”

Appellant contends the challenges to the constitutionality of S.B. 1437 are unfounded and the trial court erred in finding that she failed to set forth a prima facie case for relief and entitlement to counsel. Respondent Attorney General agrees on both points.

We agree with the parties that S.B. 1437 and section 1170.95 are not unconstitutional on the bases cited by the trial court. We also agree that appellant alleged a prima facie case for relief and therefore should have been appointed counsel. We accordingly reverse the order and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

A. Murder Conviction

In 1998, appellant was convicted of first degree murder and sentenced to life imprisonment. The details of appellant’s underlying conviction are set forth in our previous opinion

¹All further statutory references are to the Penal Code unless otherwise indicated.

resolving her direct appeal, *People v. Flores* (May 3, 2000, B125554) [nonpub. opn.].² We summarize them here.

Appellant, who associated with the Avenues gang, and two Avenues gang members, James Flores and John Martinez, were charged with the January 8, 1996 murder of Steven Ramirez. Ramirez was a member of the Cypress Park gang, a rival to the Avenues gang. He was wearing gang attire when he was murdered about half a mile from Avenues gang territory. Shell casings from two different guns were found near his body. One of the weapons, a nine-millimeter semiautomatic handgun, was recovered from appellant the day after the killing. The other weapon, an assault rifle, was recovered from the home of defendant Martinez approximately one week later. Appellant and Martinez were convicted of the first degree murder of Ramirez after a jury trial; Flores was acquitted of the Ramirez murder after the sole witness with incriminating testimony against him refused to testify.

On direct appeal, appellant only challenged the trial court's denial of her pretrial motions to exclude her statements to the police and sever her case from defendant Flores's. We found no error in the trial court's denial of appellant's pretrial motions and affirmed her conviction.

B. Petition for Resentencing

“[T]o ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who

²We grant respondent's unopposed request and take judicial notice of our unpublished opinion resolving appellant's direct appeal. (See Evid. Code, §§ 452 & 459.)

acted with reckless indifference to human life,” the Legislature enacted S.B. 1437 in 2018. (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 325, rev. granted, S260493, Mar. 18, 2020 (*Verdugo*)³; see also *People v. Lamoureux* (2019) 42 Cal.App.5th 241, 247 (*Lamoureux*).) S.B. 1437 amended section 188, defining malice, and section 189, defining the degrees of murder. Additionally, S.B. 1437 added section 1170.95, which allows a “person convicted of felony murder or murder under a natural and probable consequences theory [to] file a petition . . . to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts” under certain conditions. (§ 1170.95, subd. (a).) These changes became effective on January 1, 2019.

On May 6, 2019, appellant, in propria persona, filed a petition for resentencing under section 1170.95. On her form petition appellant checked boxes 1, 2a, and 3 stating in language paralleling that of section 1170.95, subdivision (a), “A complaint, information, or indictment was filed against me that allowed the prosecution to proceed under a theory of felony murder or murder

³The review order states: “Further action in this matter is deferred pending consideration and disposition of a related issue in *People v. Lewis*, S260598 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court.” (*Verdugo*, S260493, Supreme Court Mins., Mar. 18, 2020.) The review order in *People v. Lewis* states: “The issues to be briefed and argued are limited to the following: (1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95? (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)?” (*People v. Lewis, supra*, Supreme Court Mins. Mar. 18, 2020.)

under the natural and probable consequences doctrine”; “At trial, I was convicted of 1st or 2nd degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine”; and “I could not now be convicted of 1st or 2nd degree murder because of changes made to Penal Code §§ 188 and 189, effective January 1, 2019.” Appellant also checked box 4, requesting the trial court to appoint counsel for her during the resentencing process.

The trial court denied appellant’s petition on July 2, 2019, after reviewing the record of conviction. In denying appellant’s 1170.95 petition for resentencing, the trial court found that appellant “is not entitled to resentencing relief under P.C. 1170 as she either acted with an intent to kill when she aided and abetted the murder of the underlying victim and/or was a major participant who acted with reckless indifference to human life.” The trial court further stated that “[a]s a second and independent ground for denying this petition for resentencing, the Court finds SB 1437 and Penal Code §1170.95 are unconstitutional” for three reasons: 1) “SB 1437s [*sic*] enactment violates Article II, Section 10, Subdivision (c) of the California Constitution by amending Proposition 7 without voter approval and by amending Proposition 115 without the approval of either the voters or a super majority of the Legislature”; 2) SB 1437 violates [Marsy’s Law,] Article 1, §28(a)(6) and Article 1, §29 of the California Constitution insofar as it purports to vacate final judgments in criminal cases . . . den[ying] finality to the victims of crimes and due process to the People”; and 3) “Penal Code §1170.95 . . . violates the separation of powers doctrine established by the California Constitution . . . by commanding courts to reopen final judgments to decide cases under new law . . . [and] infringes upon

the Governor’s pardon and commutation power by commanding the courts to vacate lawful criminal convictions.”

Appellant timely filed her notice of appeal from the denial of her resentencing petition on August 29, 2019.

DISCUSSION

Appellant presents two arguments on appeal. First, she contends that the trial court erred in holding that S.B. 1437 and section 1170.95 are unconstitutional. The Attorney General agrees that the trial court’s reasoning and holding in this regard were in error. We agree with the parties.

In recent months, our sister courts have thoroughly and repeatedly examined S.B. 1437 and section 1170.95 and have rejected the grounds upon which the trial court found them unconstitutional. “Senate Bill 1437 was not an invalid amendment to Proposition 7 or Proposition 115 because it neither added to, nor took away from, the initiatives.” (*People v. Superior Court (Gooden)*, (2019) 42 Cal.App.5th 270, 275; see also *Lamoureux, supra*, 42 Cal.App.5th at p. 251; *People v. Solis* (2020) 46 Cal.App.5th 762, 775-784.) Section 1170.95 does not violate Marsy’s Law. (See *Lamoureux*, at pp. 264-266.) “[T]he resentencing provision of Senate Bill 1437 does not contravene separation of powers principles or violate the rights of crime victims.” (*Lamoureux, supra*, at p. 246; see also pp. 254-256 [discussing separation of powers].) We agree with these holdings and their underlying rationales and accordingly reject the trial court’s holding that S.B. 1437 and section 1170.95 are unconstitutional.

Second, appellant contends that the trial court erred by summarily denying her petition for resentencing and failing to grant her request for counsel. She argues that her “petition for

resentencing satisfied the statutory criteria for a *prima facie* showing of eligibility for relief under the new law. . . .” The Attorney General agrees that appellant’s petition satisfied the first-step *prima facie* showing that she is potentially eligible for relief under section 1170.95, and that there is nothing in the record before this court showing that she is ineligible for relief as a matter of law. We agree.⁴

A petition for relief “must be filed in the sentencing court and served by the petitioner on the prosecutor and the attorney who represented him or her in the trial court or the county public defender.” (*Verdugo, supra*, 44 Cal.App.5th at p. 327.) “If the petition contains all required information, section 1170.95, subdivision (c), prescribes a two-step process for the court to determine if an order to show cause should issue: “The court shall review the petition and determine if the petitioner has made a *prima facie* showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response . . . and the petitioner may file and serve a reply. . . . If the petitioner makes a *prima facie* showing that he or she is entitled to relief, the court shall issue an order to show cause.” (*Ibid.*) Courts have held, and we agree, that the trial court is entitled to evaluate at this stage the “documents in the court file or otherwise part of the record of conviction that [were] readily ascertainable. . . .” (*Id.* at p. 329.)

Here, the trial court summarily denied the petition “based on review of the overall court record” and the factual and

⁴We need not and do not consider appellant’s contentions that the trial court deprived her of statutory and constitutional rights to due process and assistance of counsel.

procedural claims contained in the petition. The trial court made a determination that those facts were sufficient to establish that appellant was not entitled to resentencing under section 1170.95 as a matter of law because she acted “with the intent to kill [when she] aided and abetted the murder of the underlying victim and/or was a major participant who acted with reckless indifference to human life.” However, the record does not clearly show that appellant was a major participant who acted with reckless indifference to human life and/or aided and abetted the murder of the victim with intent to kill. Therefore, petitioner is not ineligible for relief as a matter of law. The trial court’s denial of appellant’s petition without the appointment of counsel or a hearing accordingly was erroneous. We agree with both parties that the case should be remanded for further proceedings in compliance with section 1170.95.

DISPOSITION

The trial court’s post-conviction order denying appellant’s resentencing petition is reversed and the matter is remanded with directions to appoint counsel for appellant and hold a hearing in accordance with the terms of section 1170.95.

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COLLINS, J.

We concur:

MANELLA, P. J.

CURREY, J.